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No. 49.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

[redacted]

THE STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

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Attorneys for Appellant.

The Gunthorp-Warren Printing Co.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 302.

THE STATE OF NEW JERSEY, *Appellant*, *vs.* **WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,** *Appellee.*	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming, in part, an order entered by the District Court (Kohlsaat, J.), confirming (without opinion) the finding of the referee (Eastman) on the claim of the appellant, State of New Jersey, for franchise taxes due it from the estate of the Cosmopolitan Power Company, bankrupt. (See 137 Fed., 858.) The claim was filed December 21, 1903, for a preference for $9,254.90, under the provisions of Sec. 64, Subd. a of the Bankruptcy Act,

which gives preference to *all taxes* legally due and owing by the bankrupt. The claim is made up as follows:

"Tax—1902	$5,750.00
Interest to October 15, 1903	891.25
Costs on injunction proceedings, because of non-payment of taxes	26.15
Tax—1903	2,500.00
Interest to October 15, 1903	87.50
	$9,254.90"

(Rec., 4.)*

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of New Jersey, on April 30, 1900. Its principal office is in Jersey City, N. J. (Rec., 21.) It was organized for the purpose of manufacturing and dealing in engines, machines, vehicles, materials and merchandise of all kinds. (Rec., 21.) It had express charter power to do business in any state or territory of the United States. (Rec., 22.) All of its property was located in Illinois. (Rec., 11.) Its capital stock on January 1, 1902, was $40,000,000, of which $10,000,000 was issued and outstanding. (Rec., 11.) On May 13, 1902, its capital stock was reduced to $2,500,000. (Rec., 11, 29.) No franchise taxes have been paid to the State of New Jersey for the years 1902 and 1903. (Rec., 11.)

An involuntary petition in bankruptcy was filed against the Cosmopolitan Power Company on April 23, 1903, and the company was thereafter duly adjudicated a bankrupt. (Rec., 11.)

On November 7, 1902, the State Board of Assessors of New Jersey, upon the failure of the Cosmopolitan

*The references are to the pages of the original record.

Company to make a return, levied an assessment for license tax against the company for the year 1902 of $5,750. (Rec., 17.) On June 1, 1903, there was assessed against the company for the year beginning January 1, 1903, a similar tax of $2,500 (Rec., 30), in accordance with the return of the company, which return was filed on May 2, 1903. (Rec., 27.)

On February 12, 1904, a motion was made for an order on the Trustee to pay the claim *as a preferred claim,* in advance of the payment of dividends to the creditors of said estate. (Rec., 26.) Objections were filed to the claim by the Trustee (Rec., 2) on the ground that the claim was not entitled to priority; also that it was not properly provable against the estate. The referee disallowed, *in toto,* the 1903 tax, and allowed the 1902 tax *as a general claim* for only the sum of $4,943.08 (Rec., 10), and appellant thereupon filed its petition for review. (Rec., 12.) Thereafter, on September 12, 1904, the District Court (Kohlsaat, J.) affirmed the order of the referee (Rec., 32), without rendering an opinion. An appeal was prosecuted to the United States Circuit Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a general claim, but in other respects affirmed the judgment of the District Court, and denied priority to any part of the claim of appellant.

An appeal was thereupon taken to this court, under the provisions of Section 25, Clause 2 of the Bankruptcy Act, upon the certificate of Mr. Justice Day that the determination of the questions involved was essential to a uniform construction of the Bankruptcy Act.

The motion of appellee to dismiss the appeal was thereafter denied.

The errors relied on by appellant are:

1. That the court erred in holding that the franchise tax, upon which the claim is based, was not such a claim as was entitled to priority under Section 64a of the Bankruptcy Act of 1898.

2. That the court erred in holding that the said license fee or franchise tax was not a tax.

3. That the court erred in allowing the claim of appellant as a general claim and not as a preferred claim.

4. That the court erred in not allowing the claim of appellant as a preferred claim for the sum of $9,254.90.

5. That the court erred in holding that the franchise tax assessed against the bankrupt for the year 1902, amounting to $5,750 and the interest thereon, was not such a claim as was entitled to priority under Section 64a of the Bankruptcy Act of 1898.

6. That the court erred in holding that the franchise tax assessed against the bankrupt for the year 1903, amounting to $2,500 and the interest thereon, was not entitled to priority under Section 64a of the Bankruptcy Act of 1898.

7. That the court erred in reducing the claim of appellant for the franchise tax of 1902 from $5,750 to $4,250.

Appellee obtained leave in this court to assign cross-error with respect to the action of the Court of Appeals in allowing the claim of appellant for the franchise tax or license fee for the year 1903.

BRIEF.

I.

THE CLAIM OF THE APPELLANT IS A TAX WITHIN THE MEANING OF THE BANKRUPTCY ACT AND IS ENTITLED TO PRIORITY AS SUCH.

Tennessee v. *Whitworth*, 117 U. S., 129, 136.

State v. *Evening Journal Ass'n*, 47 N. J. L., 36.

State Board of Assessors v. *Central R. R. Co.*, 48 N. J. L., 146; s. c., 4 Atl., 578.

Standard Cable Co. v. *Attorney General*, 46 N. J. Eq., 270; s. c., 19 Atl., 733.

Pipe Line Co. v. *Berry*, 52 N. J. L., 308, 311; s. c., 19 Atl., 665.

Trenton Savings Fund v. *Richards*, 52 N. J. L., 156; 18 Atl., 582.

Honduras Commercial Co. v. *State Board of Assessors*, 54 N. J. L., 278; s. c., 23 Atl., 668.

Lumberville Bridge Co. v. *Assessors*, 55 N. J. L., 529; s. c., 26 Atl., 711.

State v. *Board of Assessors*, 61 N. J. L., 461; s. c., 39 Atl., 638.

Hancock; Comptroller v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl. Rep., 846.

Mutual Mercantile Agency, 8 Am. Bank Reps., 435.

Myers v. *Campbell*, 64 N. J. L., 186; s. c., 44 Atl., 863.

Ches. & O. Ry. Co. v. *Atlantic Transp. Co.*, 62 N. J. Eq., 751; s. c., 48 Atl., 997.

Mayor, etc., of Newark v. *State Board*, 51 Atl., 67; s. c., 67 N. J. L., 246.

Arimex Cons. Copper Co. v. *State Board*, 54 Atl., 244; s. c., 69 N. J. L., 121.

Hardin v. *Morgan*, 70 N. J. L., 484; 57 Atl., 155.

W. U. Tel. Co. v. *Massachusetts*, 125 U. S., 530.

Massachusetts v. *W. U. Tel. Co.*, 141 U. S., 40, 45.

Wilmington R. R. Co. v. *Reid*, 13 Wall., 264.

Atlantic & Pacific Tel. Co. v. *Philadelphia*, 190 U. S., 160.

Western Union Tel. Co. v. *Missouri*, 190 U. S., 412.

14 Am. & Eng. Ency. of Law (2nd Ed.), p. 6.

27 Am. & Eng. Ency. of Law (2nd Ed.), pp. 578, 932.

I. C. R. R. Co. v. *Decatur*, 147 U. S., 190, 199.

City of Camden v. *Allen*, 26 N. J. L., 398.

1st Nat. Bank v. *Aultman, Miller & Co.*, 12 Am. Bank Reps., 12.

2 Cook on Corporations (5th Ed.), 561-3.

a.

In re United States Car Co., 60 N. J. Eq., 514; s. c., 43 Atl., 673.

In re Danville Rolling Mill Co., 121 Fed., 432, distinguished.

II.

AN OBITER DICTUM IS NOT BINDING ON THE COURT.

Cohens v. *Virginia*, 6 Wheat., 264, 399.

Carroll v. *Lessee of Carroll*, 16 How., 275, 286, 287.

Frants v. *Brown*, 17 S. & R. (Pa.), 292.

Northern Bank v. *Porter Township*, 110 U. S., 608, 615.

Matz v. *C. & A. R. R. Co.*, 85 Fed., 180.

2 Rose's Notes to U. S. Reports, 81-2.

Rohrback v. *Germania Fire Ins. Co.*, 62 N. Y., 47, 58.

9 Ency. of Law, 2d Ed., 452.

ARGUMENT.

I.

ARE THE TAXES IN QUESTION ENTITLED TO PRIORITY?

Sec. 64, Subd. a of the Bankruptcy Act, upon which the claim of appellant is based, provides as follows:

> "The court shall order the Trustee to pay *all taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." (30 Stat. L., 563.)

The objection made to the allowance of the claim, is that it is not a claim for taxes within the meaning of this section. The principal question here involved, therefore, is whether a franchise tax comes within the meaning of the phrase, "all taxes legally due and owing" to the state, etc.

Prior to the present decision there were two cases decided by the District Courts involving this identical question. One of these cases (*In re Mercantile Agency*, 8 Am. B. Rep., 435), decided September 3, 1902, in the Southern District of New York, sustains the preferential character of a precisely similar claim, and the other (*In re Danville Rolling Mill Co.*, 10 Am. B. Rep., 327), decided April 3, 1903, in the Eastern District of Pennsylvania, holds that the claim is not a tax. The latter decision makes no reference to the earlier hold-

ing, and it is a fair presumption that it was not called to the attention of the court.

The earlier case (*In re Mutual Mercantile Agency*) relies conclusively upon *Hancock* v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl., 846 (decided Nov. 14, 1898), while *In re Danville Rolling Mill Co.*, with equal confidence seeks support in the U. S. Car Company's case, 60 N. J. Eq., 514; s. c., 43 Atl., 673 (decided July 7, 1899). The language relied on in that case to the effect that a franchise tax *is not a tax* is pure dictum, as we believe we will be fully able to demonstrate hereafter.

The law under which the present tax was assessed is the Act of April 18, 1884 (Laws of N. J. of 1884, Chap. 159), as amended. (Dill's Corporation Law of New Jersey, edition of 1903, pp. 151-163.) The act is entitled, "An Act to provide for the imposition of *State taxes* upon certain corporations and for the collection thereof." Section 1 provides that:

> "All corporations * * * shall pay an annual license fee or *franchise tax* of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of $3,000,000."

The same section further provides for the making of a return on or before the first Tuesday of May of the amount of stock outstanding on the preceding January first.

Section 2 provides that on failure of the corporation to make return, the State Board of Assessors shall fix the "annual license fee or franchise *tax*," and the amount so fixed "shall stand as the *basis of taxation*" under the act.

Section 3 provides that the State Board of Assessors shall report to the Comptroller on or before the first Monday of June in each year, a statement of the basis of "the annual license fee or *franchise tax*" and the "amount of *tax*" due, which *tax* shall thereupon be due and payable, and that if the *tax* remains unpaid on July 1st, interest shall be charged.

Section 4 provides:

> "*Such tax*, when determined, shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such *tax* shall also be a preferred debt in case of insolvency."

Section 5 provides that in addition to other remedies for the collection of such *tax*, it shall be lawful whenever any *tax* shall remain in arrears for three months, to apply for an injunction to restrain the corporation from the exercise of any franchise or the transaction of any business until the payment of such *tax*.

Section 6 provides that if any corporation shall for two consecutive years fail to pay any *tax* which shall be assessed against it, the charter shall be void unless further time is given for the payment of such *taxes*.

Section 7 provides for making a list of delinquent corporations which fail to pay *taxes*.

Section 10 provides for the appointment of a receiver to enforce the collection of *taxes*.

It will be noticed that in every section of the Statute the charge is referred to and characterized as a *tax*. In every decision under this act (and there are many

of them) the nature of this charge has been discussed and its character as a *tax* has been firmly established.

In *Tennessee* v. *Whitworth*, 117 U. S., 129, 136, this court classified the various elements of corporate taxation as follows:

> "In corporations four elements of taxable value are sometimes found: 1, *franchises;* 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. *Each of these is, under some circumstances, an appropriate subject of taxation.*"

The tax here in controversy is clearly *a franchise tax* and falls under the first classification of the foregoing decision. The question, however, is set at rest by the decisions of the courts of New Jersey, which, upon the present inquiry, are of controlling authority.

In *State* v. *Evening Journal Assn.*, 47 N. J. L., 36 (decided 1885) the license fee imposed under the Act of 1884 is held to be a tax. The court said:

> "By the fourth section of this act a tax in the shape of a yearly license fee was laid upon certain companies. * * * In the same section it was further enacted that all other corporations, incorporated under the laws of this state and not thereinbefore provided for, should pay a yearly license fee or *tax* of one-tenth of one per cent. on the amount of the capital stock of such corporation * * * Pamph. L, 1884, p. 234. It is true that the Act of 1884 imposes *the tax* by way of a license for exercising corporate franchise, but *the tax* is laid with respect to the capital stock of such corporations and for the privilege of doing business in this state."

In *State Board of Assessors* v. *Central R. R. Co.*, 48 N. J. L., 146; s. c., 4 Atl. 578 (decided 1886), the Act

of 1884 was again construed. The report of the case covers more than 200 pages. Throughout the opinion will be found decisive language to the effect that the charge in question is a tax.

In *Standard Cable Co.* v. *Attorney General*, 46 N. J. Eq., 270; s. c., 19 Atl., 733 (decided 1889), the nature of the tax in question was again discussed. The Cable Company was a New Jersey corporation, carrying on its business in another state, precisely as did the bankrupt in the present case. It was contended that the tax was violative of the constitutional provision that property shall be assessed for taxation under general and uniform laws. The court said:

> "The fault of this position is the assumption that *this tax is one upon property.* Such, manifestly, is not the case. The law in question *imposes a tax* on certain corporations by way of a license *for exercising corporate franchises.* It is declared to be *such tax* by the act, and, although it is laid on this class of corporations with respect to the capital stock, *the tax possesses the legal quality of a license or franchise tax. Evening Journal Association* v. *State Board of Assessors*, 18 Vr., 36; Cooley Tax. (2nd Ed.), 379, and cases cited.
>
> "Upon the power of the legislature to *impose such a tax*, there exists no restriction in our constitution. As a license *or franchise*, it is not within the *equality* clause of the constitution referred to."

It was also contended that the company was engaged in interstate commerce and was therefore exempt. The court said:

> "These grounds impress me only by their novelty. Our general laws for the organization of corporations permit companies to transact their business in other States. It certainly has not

been supposed that the exercise of this right put them beyond the reach of *taxation* everywhere, or brought them into any relations whatever with the provision in the federal constitution referred to. *No case is cited giving the slightest countenance to the notion that to hold a charter from one state, when the corporate property is located, or corporate business transacted, in another state, relieves the corporation in both or either state from taxation in any form which the legislative power may, under its State Constitution, adopt;* nor any case in which these conditions are given the slightest consequence in ascertaining the limit of the state power to *tax* either the property of the corporation where such property has its situs, *or its franchises in the state which granted them.*"

The court, speaking of the system of taxation under the Act of 1884, continued:

"Under that system, tax is laid on the corporation, business or property when its corporate operations or property are here. *When its real business and property are elsewhere, and out of state protection, a tax on the franchises and privileges upheld by the state alone is imposed.* Such a system is as near an approach to that equality which is desirable in all taxation as any other scheme that may be suggested."

In *Pipe Line Co.* v. *Berry* (decided 1890), 52 N. J. L., 308, 311; s. c., 19 Atl., 665, it is said:

"The Act of 1884 requires all the enumerated corporations doing business in this state to *pay an annual tax, for the use of the state, by way of a license for their corporate franchises.*"

And on appeal in the same case (53 N. J. L., 212; s. c., 21 Atl., 490, decided November, 1890), the court said:

"The prosecutor was assessed and *paid a tax* under the Act of April 18, 1884, entited, 'An Act

to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof.' Rev. Sup., p. 1016.

"Taxation under the Act of 1884 *was designed to provide revenue for the state."*

And again in *Trenton Savings Fund* v. *Richards*, 52 N. J. L., 156; s. c., 18 Atl., 582 (decided 1892), an imposition, on savings banks similar to that imposed by the Act of 1884, was upheld as a tax. The court said:

"The *tax* is, in our judgment, to be regarded *as a personal tax*, chargeable upon this class of artificial persons either *because of the franchises which they enjoy*, or because of the business which they do."

And in *Honduras Commercial Co.* v. *State Board of Assessors*, 54 N. J. L., 278; s. c., 23 Atl., 668 (decided 1892), a tax was levied under the Act of 1884 upon a New Jersey corporation *whose sole business was conducted and whose capital was invested in the Republic of Honduras.* The court said:

"The tax imposed *is a franchise tax* exacted from the company *as the price of the right and privilege*, which it received from the state, *of being a corporation.* Although the amount to be paid is determined by the amount of the capital stock and the duration of the corporate life, yet these are only the *criteria* chosen by the legislature for ascertaining the probable value of the corporate franchise which the company assumed. *The tax is not levied upon the corporate property or business. Standard Underground Cable Co.* v. *Attorney General*, 1 Dick., Ch. Rep., 270.

"Such a tax may be collected by the state granting the corporate franchise, *no matter how the property of the company may be invested or employed, or where it may be situate."*

And in *Lumberville Bridge Co.* v. *Assessors*, 55 N. J. L., 529; s. c., 26 Atl., 711 (decided 1893), the Act of 1884 is again construed. The court said:

> "The franchise *that is taxed as property* is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is *the right to exist in corporate form* without reference to the powers that under such form the company may exercise. * * * It is, in short, *a poll tax* levied upon domestic corporations for the right to be. Such a *tax*, is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on."

And in *State* v. *Board of Assessors* (decided 1898), 61 N. J. L., 461; s. c., 39 Atl., 638, to quote the syllabus, it is held that:

> "The *tax* imposed by 'An Act to provide for the imposition of *state taxes* upon certain corporations and for the collection thereof,' approved April 18, 1884, and its supplements (Gen. Stat., pp. 3335 *et seq.*), is *a franchise*, not a property, *tax*, and is not subject to diminution because some of the capital of the corporation taxed is invested in rights under letters-patent of the United States, not *taxable* as property."

In *Hancock, Comptroller*, v. *Singer Mfg. Co.*, 62 N. J. L., 289; s. c., 41 Atl., 846 (decided November 14, 1898), the exact question here in controversy was decided. This was the case upon which the decision in *In re Mutual Mercantile Agency*, 8 Am. Bank. Rep., 435, *supra*, was based, where it was held that the tax here in controversy was entitled to priority. The Singer case was argued at great length by eminent counsel, the report covering 64 pages. The facts in that case were as follows:

The State Board of Assessors imposed a franchise tax upon the entire capital stock of the company, less the assessed value of its real and personal property in New Jersey. The assessment was imposed under the corporation tax act of 1884, as amended in 1892, which is the same law as that under which the present assessment was made. The Singer Company, which was organized in New Jersey under a special charter, contended that it was exempt under that charter from liability to the assessment imposed. The charter provided that upon certain conditions—

> "The real and personal property of the said corporation not actually and in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, *shall not be liable to any tax or impost whatsoever.*"

It was contended for the state, that a *license tax* was not a tax in the sense that the word was used in the charter.

The court held that an exemption of the shares of a corporation from taxation would also exempt the corporation, as a burden upon the company would be a burden upon its shares. In overruling the contention of the state that the license fee *was not a tax,* the court said:

> "The Act of 1884 (Pamph. L, p. 232) is entitled 'An Act to provide for the imposition *of state taxes* upon certain corporations and for the collection thereof.'
>
> "In this act this imposition is called a yearly license fee *or tax.*
>
> "In a supplement passed to the Act of 1884 (Pamph. L, 1891, p. 150) it is styled '*a tax.*'
>
> "In a further supplement passed in 1892

(Pamph. L, p. 136), it is called 'an annual license fee *or franchise tax.*'

"It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or '*franchise tax*' cannot validate it. It is levied under an act passed 'to authorize the impostion of *state taxes,*' and it is none the less an interdicted imposition, *and none the less a tax because it is given a new name.*

"Although under our adjudications it is not *a tax on property* in a sense which brings it within article 4, section 7, paragraph 12, of our State Constitution, *it is a tax on the capital stock of the corporation.* Otherwise the act would be manifestly void for want of a title expressing its object, and the state would be deprived of all its *revenue* under the Act of 1892. The franchise of the company is the *right* to hold property and *exercise its corporate privileges.* The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. *Wilmington Railroad Co.* v. *Reid,* 13 Wall., 264."

The opinion of the court was concurred in by nine Justices, including Chancellor McGill, Chief Justice Magie and Justices Depue, Ludlow, Van Syckel, Adams, Bogert, Hendrickson and Nixon, a fact which will be of apt interest when we later discuss the U. S. Car Co. case, 60 N. J. Eq., 514, relied on by the appellee.

In the matter of *Mutual Mercantile Agency,* 8 American Bankruptcy Reports, p. 435, decided September 3, 1902, the facts were as follows: The Mutual Mercantile Agency, a New Jersey corporation, was adjudicated a bankrupt on the 25th day of October, 1901, in the Southern District of New York. On the 28th day of February, 1902, the State of New

Jersey filed a proof of claim for a franchise tax assessed upon the corporation *for the year* 1901. The claim was objected to by the Trustee in Bankruptcy, on the ground that it was not a tax within the meaning of the Bankruptcy Law, and was not therefore entitled to priority. The referee referred to section 64, subdivision A, of the Bankrupt Law, and said:

> "In the case of *Hancock, Comptroller,* v. *Singer Mfg. Co.,* reported in 62 N. J. L., 289, the highest court of the State of New Jersey, has *in no uncertain way* decided that the franchise tax *was a tax.* In this case of *Hancock* v. *Singer Mfg. Co.*, the question came before the court for its decision as to whether or not a 'franchise tax' or 'license fee' *was a tax.* In the said case, the State of New Jersey had given a charter to the Singer Mfg. Co. with the following exemption:
>
> "The exemption in the charter is in these words: 'The real and personal property of the said corporation not actually in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, shall not be liable *to any tax* or impost whatsoever.'
>
> "The comptroller contended that the exemption from tax or impost did not include license, and therefore the state had a right to assess a license.
>
> "The attorneys for the company contended that the license fee is still an annual exaction imposed *for the purpose of public revenue.* Such exactions have always been held to be *taxes* by whatever name they happen to be called. *Western Union Telegraph Co.* v. *Mass.,* 125 U. S., 536, 547; *Illinois Central Railroad Co.* v. *Decatur,* 147 U. S., 190-199; *Patterson* v. *Society for Useful Mfgs.,* 4 Zabr., 385, 400. See especially *Tennessee* v. *Union & Planters' Bank,* 9 Yerg., 490; *Worth* v. *Petersburg Railroad Co.,* 89 N. C., 301."

The referee quoted the opinion of Justice Van Syckel in the Hancock case, *supra,* to the effect that the imposition in question was a tax, and concluded:

> "This case is controlling. To hold otherwise would be to deny the State of New Jersey a priority under the above-mentioned section, *as all of the revenue of the State is raised by franchise tax,* except a small school tax.
>
> "There is nothing in the Bankruptcy Act to suggest an intention of Congress, in the use of the word 'tax' *to limit the meaning to any particular kind of tax.*
>
> "Therefore, an order may be entered allowing the aforesaid claim of the State of New Jersey as a priority claim and directing the trustee to pay the same."

This decision was affirmed by the District Court.

The only New Jersey case cited as holding a contrary doctrine is *In re United States Car Co.,* 60 N. J. Eq., 514, s. c., 43 Atl., 673 (decided July 7, 1899). The facts were as follows: The State of New Jersey assessed a state tax against the car company, under the Act of 1884, *subsequent* to the entry of a decree of insolvency and the appointment of receivers. The receivers did not have sufficient assets to pay the debts of the company; nor was the business of the company continued in any way, nor its franchises exercised *after* the appointment of the receivers. The court said:

> "The question presented for decision by this court is whether under these circumstances the state is entitled to priority in payment, out of the assets in the hands of a receiver, of a *tax* assessed against the corporation, *after his appointment.*
>
> "In the court below it was considered that the liability of a receiver to pay such *tax,* to the detriment of the general creditors, depended upon

whether the franchises of the company were a valuable asset in his hands, and whether he continued to use them, *after his appointment,* for the benefit of the creditors and stockholders of the corporation, and, reaching the conclusion that in the case now before us *the corporate franchises were valueless, and it being admitted that they had not been used by the receivers,* the court decreed that the *tax* assessed was not payable out of the funds in their hands until after all indebtedness existing at the time of the appointment of the receivers was discharged.

"*We cannot concur in this view.* Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly *is not a tax upon corporate franchises.* In fact, it is not, *strictly speaking,* a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its *property* or of its *franchises,* and without regard to whether it exercises the latter or not, *solely as a condition of its continued existence.* The state, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*

"Applying *this* test, it is quite clear that the so-called *tax* was *properly* imposed in the present

case. At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it, but, on the contrary, its corporate life was continued for the benefit of its creditors pending the final distribution of its assets."

The court, therefore, *reversed* the lower court (*Crews* v. *U. S. Car Company*, 57 N. J. Eq., 357) and directed *preferential* payment to be made.

The haphazard statement that the tax in question was "not, strictly speaking, a *tax*" was not called for by any issue in the case and was clearly *obiter*.

It was not necessary to decide, in determining this question, whether the imposition in question was or was not a tax. The only issue, as the court itself said, was whether the charge was payable if it was imposed *after the appointment of a receiver*. The court decided that payment must be made, because of the provision of the New Jersey act (Section 6) that

> "*Such* TAX *shall be a preferred debt in case of insolvency.*"

A reading of the case in both the lower and appellate courts demonstrates that the language in question is utterly *obiter*.

It was wholly immaterial to the case whether it was or was not a tax. Whether it was or was not a tax it was still entitled to priority under the express words of the act above quoted.

But even if the language of the court cannot be considered as *dicta*, the court did not intend to hold, and in fact did not hold, that the imposition in question *was not a tax*.

The court says:

> "It plainly is not a tax *upon corporate franchises.* In fact it is not, *strictly speaking,* a tax at all."

It was contended that inasmuch as the receivers had not exercised the corporate franchises, they were not liable for the tax (Opin., p. 515)—in other words, that the tax was conditioned upon *the actual exercise and user of the corporate franchises.* The court answered this contention by the language above quoted, to the effect that it was *not a tax upon corporate franchises,* but a tax upon the corporation *for the mere privilege of existing,* and not upon the *actual user* of its corporate powers.

The court, when it said that it was "not *strictly speaking* a tax," had in mind the long line of its own decisions to the effect that the license fee imposed under the Act of 1884 was not a *property* tax within the meaning of the constitution of New Jersey which provides that

> "*property* shall be assessed for *taxes* under general laws and by uniform rules, according to its true value." (Art. 4, Sec. 7, Subd. 12.)

In other words, the court meant and said that the tax was not a *property* tax as the courts of New Jersey had repeatedly theretofore held.

Neither on principle nor authority can it be contended that the word "tax" as used in the Bankruptcy Act (Sec. 64, Subd. A) applies only to a "*property tax.*"

The word "*tax*" is not there used in a restricted sense. The act expressly provides that "*all taxes*" shall be paid.

In the Car Company case the court *allowed* the preference of the state in the insolvency proceedings. In doing so the court necessarily must have held that the claim was a *tax* because the New Jersey statute (Sec. 6) only allows a preference to a *tax*. It provides:

> "Such *tax* shall also be a *preferred* debt in case of insolvency."

The court said that it was not a tax, "*strictly speaking,*" *because it had not the elements of a tax.* The only element lacking in the present tax is that of *uniformity* which is required by the New Jersey Constitution, *and this element, as the courts of New Jersey have repeatedly held, is only essential to a* PROPERTY *tax.* The present tax is assessed under an act in regard to "*state taxes.*" It is levied in substantially the same manner as other state taxes and the act (as was expressly held in *Pipe Line Co.* v. *Berry,* 52 N. J. L., 308, *supra*) was designed to provide revenue for the state.

The present tax, if it were considered as a *property tax,* would violate the New Jersey Constitution, but inasmuch as the courts of New Jersey have held that the constitutional provision in question has no application to the present tax, it is none the less *a tax* because it lacks an element which is essential only to a particular kind of tax, *i. e., a property* tax. But the Bankruptcy Act applies to taxes in general and to "*all taxes,*" and not merely to property taxes. That the court in the Car Company case did not hold that the imposition was not a tax in its general sense, and in the sense that the word is used in the Bankruptcy Act, is evident not only from the *previous,* but also from the subsequent decisions of the same court.

In the Car Company case (decided July 7, 1899), the majority opinion was concurred in by nine justices, viz.: Depue, Van Syckel, Dixon, Garrison, Lippincott, Gummere, Ludlow, Bogert and Vredenburgh.

The Singer Mfg. Co. case had been before the highest court of New Jersey on two occasions. The first was *Singer Mfg. Co.* v. *Heppenheimer, Comptroller,* 58 N. J. L., 633 (decided 1896). Of the nine judges who concurred in the majority opinion in the Car Co. case, the following six concurred in the opinion in the first Singer case: Depue, Gummere, Lippincott, Van Syckel, Bogert, and Dixon. That opinion was unanimous. In the second Singer case (62 N. J. L., 289), decided November 14, 1898, twelve judges sat. Justice Vredenburgh concurred in the conclusion; and the opinion itself was concurred in by nine other justices. Of the nine who decided the Car Co. case, *seven* concurred in the various opinions in the Singer cases. In fact both opinions in the Singer cases were written by Justice Van Syckel, who was one of the *concurring* justices in the Car Co. case. Justice Gummere, who wrote the opinion in the Car Co. case, was one of the *concurring* justices in the first Singer case. This leaves only Justices Garrison and Dixon, who dissented in the second Singer case, to be accounted for. Both Justices Garrison and Dixon, however, are on record on this very question. In the following cases Justice Dixon has passed upon the act of 1884 here under discussion, in cases where the license fee in question was clearly held to be a tax.

Standard Cable Co. v. *Atty. General,* 46 N. J. Eq., 270; s. c., 19 Atl., 733.

State Board v. *Central R. R. Co.,* 48 N. J. L., 146; s. c., 4 Atl., 578.

State v. *Richards,* 52 N. J. L., 156; s. c., 18 Atl., 582.

Honduras Co. v. *State Board,* 54 N. J. L., 278; s. c., 23 Atl., 668.

In the following cases of the same character, Justice Garrison concurred in holding the charge to be a tax.

Standard Cable Co. v. *Atty. General,* 46 N. J. Eq., 270; s. c., 19 Atl., 733.

Lumberville Bridge Co. v. *Assessors,* 55 N. J. L., 529; s. c., 26 Atl., 711.

The last Singer case was decided November 14, 1898. The Car Co. case was decided July 7, 1899, less than eight months later. The Singer case is on all fours with the one at bar and is a conclusive holding that the present assessment is a tax. It cannot be seriously contended that the judges who decided the Car Co. case intended that the long line of previous and consistent decisions should be overruled. *The Car Co. case does not even make* the slightest reference to any of them. The inadvertent *dictum,* therefore is only an instance where

"Even the worthy Homer sometimes nods."

The Singer case was argued twice in the Supreme Court of Errors by eminent counsel, and the well reasoned opinion of the court shows mature and thorough deliberation. But a reading of both the Singer case (62 N. J. L., 289) and the Car Company case (60 N. J. Eq., 514), shows that in fact there is no real conflict between them. The language of the Car Company

case, even if it were not mere *dictum*, cannot be construed as holding that the imposition in question is not a *tax* within the meaning of that word, *as it is used in the Bankruptcy Act*. The language of the court in the Car Company case must be construed with reference to the facts in that case and read in the light of the prior decisions of the same court. When this is done the contention that the franchise tax is not a tax will fall and opposing counsel can then well say:

"Nor is it Homer nods, but we that dream."

In *Cohens* v. *Virginia*, 6 Wheat., 264, 399, Chief Justice Marshall, in speaking of some *dicta* of the same court in an earlier case, said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, *but they ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This language is quoted with approval in *Carroll* v. *Lessee of Carroll*, 16 How., 275, 286, 287, where the court said (p. 286):

> "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of the common law, an opinion on such a question is not a

decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of parties to whom the property in contestation belongs.

And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

In *Frantz* v. *Brown*, 17 S. & R. (Pa.), 292, Houston, J., said:

"If general *dicta*, in cases turning on special circumstances, are to be considered as establishing the law, nothing is yet settled or ever can be long settled. An eminent judge (Benson) has left us, in one of the New York cases, an animated appeal against charging him as liable for the correctness of *dicta*, on points not trying: and I join him, most cordially. What I have said or written out of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will never consider myself bound by it, when the point is fairly trying and fully argued and considered. And I protest against any person considering such *obiter dicta* as my deliberate opinion."

And to like effect are:

Northern Bank v. *Porter Township*, 110 U. S., 608, 615.

Matz v. *C. & A. R. R. Co.*, 85 Fed., 180.

2 Rose's Notes to U. S. Reports, 81-2.

Rohrback v. *Germania Fire Ins. Co.*, 62 N. Y., 47, 58.

9 Ency. of Law, 2d Ed., 452.

That the Car Co. case is not regarded as departing from the Singer case, is strengthened by the fact that

the Singer case is approvingly cited in the *subsequent* case of

> *Myers* v. *Campbell*, 64 N. J. L., 186; s. c., 44 Atl., 863 (November 13, 1899—*several months after the Car Co. decision*).

In *Ches. & O. Ry. Co.* v. *Atlantic Transp. Co.* (Court of Errors & Appeals, N. J.), 62 N. J. Eq., 751; s. c., 48 Atl., 997, decided March 4th, 1901, the franchise tax under the act of 1884 is again characterized *as a tax.* In that case, the tax was levied by the state *during a receivership* of an insolvent corporation and the court held that it was entitled to payment in preference to the liabilities incurred by the receiver in carrying on the business of the insolvent corporation.

And in *Mayor, etc., of Newark* v. *State Board*, 51 Atl., 67 (Court of Errors & Appeals), 67 N. J. L., 246; decided January 27, 1902, it was held that a franchise of a corporation was taxable as such. The opinion was rendered by Justice Gummere, who before that had rendered the decision in the Car Co. case, *supra.*

And in *Arimex Cons. Copper Co.* v. *State Board*, (Sup. Ct. N. J.), 69 N. J. L., 121; s. c., 54 Atl., 244, decided February 24, 1903, the assessment under the act of 1884, is again referred to as a tax. The court saying:—

> "the legal basis *of the tax* is the capital stock issued and outstanding."

And again in *Hardin* v. *Morgan*, 70 N. J. L., 484, s. c., 57 Atl., 155, decided February 23, 1904, the assessment is again described as a tax.

And in the act of March 29, 1904 (Chap. 219, Laws of N. J., 1904), the legislature, in an act providing for

the reinstatement of corporations for non-payment of annual franchise taxes, again refers to the assessment as a tax.

When the Singer case was pressed upon the attention of the Court of Appeals as a controlling authority, the court said:

> "But if we are mistaken, and if the Singer Company case is to be accepted as an authoritative decision that the charge in question is a tax, *we do not believe that the United States Bankruptcy Courts are bound to follow it blindly.* THE QUESTION WITH THEM IS THE INTERPRETATION AND APPLICATION OF Section 64a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance and the Federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And moreover, the latter part of Section 64a seems to direct the bankruptcy courts to determine independently the 'legality of any such tax.' "

This holding of the court to the effect that it is not bound to follow the state decisions as to what constitutes a tax is contrary to the decided cases.

In re Ott, 2 A. B. R., 637 (Dist. Ct. So. Dist. of Ia., East Div.), s. c., 95 Fed., 274, Judge Woolson, in a lengthy opinion, holds that the decisions of the highest courts of the state, as to whether or not a particular charge is a tax, are binding on the Federal courts sitting in bankruptcy, saying:

> "I am convinced that this court must follow the state court on this matter."

And in the matter of *Emmerman* v. *Ohio Steel & Iron Co.*, 13 Am. B. R., 40 (Dist. Ct. No. Dist. of Ohio, E. D.), Referee Doyle said:

> "In determining what is a tax in the respective states, the bankruptcy courts look to the laws and decisions of such states."

This decision was affirmed by Judge Wing on January 9, 1905.

It has been uniformly held that the construction placed by the highest courts of a state upon a statute of such state, is controlling upon the Federal Court.

Sec. 721, Rev. Stats. of U. S.
Bell v. *Morrison*, 1 Pet., 351.
D'Wolf v. *Rabaud*, 1 Pet., 476.
Burgess v. *Seligman*, 107 U. S., 20.

Appellee relies on *In re Danville Rolling Mill Co.*, 121 Fed., 432, decided by District Judge McPherson (Eastern Dist. of Penn.), April 3, 1903. That case is based solely on the Car Co. decision, and if that furnishes no support, the Rolling Mill case as an authority fails. None of the prior decisions of the New Jersey courts is referred to by Judge McPherson, whose opinion is brief and blindly follows the *obiter* in the Car Co. case.

The courts of New Jersey, however, do not stand alone in their holdings to the effect that the imposition of an annual franchise fee is a tax. In fact, the decisions of the courts throughout the country are unanimous to that effect.

In *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., 530, in speaking of a charge of this character this court says:

"But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an *excise* upon the capital of the corporation."

And in *Massachusetts* v. *W. U. Tel. Co.*, 141 U. S., 40, 45, this court said:

"By whatever name the *tax* may be called, as described in the laws of Massachusetts, it is essentially an *excise* upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution *to the support of its government* upon the amount and value of the capital so employed by it therein."

In *Wilmington R. R. Co.* v. *Reid*, 13 Wall., 264, a statute exempted all the property of a railroad from taxation. The state imposed a franchise tax upon the corporation. This court said:

"It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature therefore, was not inhibited from taxing it. *This position is equally unsound with the others taken in the case.* Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true, it is not the same sort of property as the rolling stock, road bed, and depot grounds, but it is equally with them covered by the general term '*the property of the company*,' and, therefore, equally within the protection of the charter."

In the recent case of *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S., 160, decided June 1, 1903, this court at p. 163 said:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is, *as a part of its property,* subject to state taxation providing at least the franchise is not derived from the United States. *Delaware Railroad Tax,* 18 Wall., 206, 232; *Postal Tel. Cable Company* v. *Adams,* 155 U. S., 688, 696; *Erie Railroad* v. *Pennsylvania,* 158 U. S., 431, 437; *Central Pacific Railroad* v. *California,* 162 U. S., 91; *Western Union Telegraph Company* v. *Taggart,* 163 U. S., 1, 18; *Western Union Telegraph Co.* v. *Missouri, ex rel. Gottlieb, post,* 412."

And to like effect is *Western Union Tel. Co.* v. *Missouri,* in the same volume (190, p. 412).

And in 14 Am. & Eng. Ency. of Law (2nd Ed.), p. 6, many authorities are cited supporting the text that:

> "A franchise is an incorporeal hereditament and *therefore property.* It is a franchise for a number of persons to be incorporated and subsist as a body politic," etc.

In 27 Am. & Eng. Ency. of Law (2nd Ed.), 932, it is said:

> "Unless exempted in terms which amount to a contract the privileges and franchises of a private corporation are as much *a legitimate subject of taxation* as other taxable subjects which are within the sovereign power of the state."

In the notes will be found a great array of supporting authorities, both Federal and State.

In *I. C. R. R.* v. *Decatur,* 147 U. S., 190, 199, "taxes" are defined as "burdens, charges, or impositions put or set upon persons or property for public uses."

And in 27 Ency. of Law (2nd Ed.), p. 578, "taxes" are defined as follows:

> "Taxes are generally defined as burdens or charges imposed by legislative authority on per-

> sons or property to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.' "

In *City of Camden* v. *Allen*, 26 N. J. L., 398, the court said:

> "A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state."

In *1st Nat. Bank* v. *Aultman, Miller & Co.* (June 13, 1904), Vol. 12 Am. Bank. Rep., p. 12 (Northern District of Ohio) the referee held that a franchise tax owing by a corporation to the State of Ohio, was a provable claim in bankruptcy and entitled to priority. This case relies on *Southern Gum Co.* v. *Laglin*, 66 Ohio St., 578, s. c., 64 N. E., 564, which squarely holds that an annual corporate franchise tax of one-tenth of one per cent. on the issued and outstanding stock is a tax.

A similar conclusion was reached by Referee Doyle in *Matter of Emmerman* v. *Ohio Steel & Iron Co.* (Dist. Court, N. Dist. of Ohio, E. D.), 13 Am. B. R., p. 40, decided June, 1904, which decision was affirmed by Judge Wing on January 9, 1905.

The subject is also fully discussed in 2 Cook on Corporation (5th Ed.), 561-563.

We believe that the authorities (with the exception of the opinion of Judge McPherson) are unanimous to the effect that the tax in question comes within both the spirit and meaning of clause 64A of the Bankruptcy Act. If the imposition is not a tax, it is difficult to discover what it is. If it is not a tax, what is it?

This difficulty was evidently shared in by the Court of Appeals in holding that the imposition was not a tax. The Court says:

> "If it be conceded that the word 'taxes' in Sec. 64a includes every contribution to the support of government which any state may exact from the persons, occupations and possessions of its citizens and corporate subjects, is the charge in question a tax? It is not a capitation tax, for it is not laid upon corporations by the head. It is not an occupation tax, for it has no regard to the business in which the corporations engage. It is not a property tax, for it pays no heed to the extent or value of property, as the state constitution requires. Franchises are property. The franchise to be and the franchise to do both go wherever the corporation goes; both are property. *Adams Express Co.* v. *Ohio,* 166 U. S., 185, 224. A state may grant franchises and then tax them as property, just as it may grant or lease land and then tax the granted estate as property. But the tax upon the estate is not to be confused with the consideration for the grant. If one pays a lump sum or annual sums as the consideration for the grant, he does so by virtue of a contract; but he is not thereby relieved from the sovereign demand, *in invitum. And that is the distinguishing feature of a tax,—the sovereign does not bargain with his subject, he commands.* The statute here under consideration does not purport to be an amendment of the incorporation laws of the state. But when the incorporators of the bankrupt came to seek a charter, this statute expressed one of the terms on which it could be obtained and held. The sovereign state could not command the incorporators to accept a charter; it could only say, if you do accept it, you must pay so and so for the grant."

And again, in upholding the action of the referee in reducing the assessment for the year 1902 from $5,750

to $4,250 and replying to appellant's suggestion that the action of the taxing authorities in fixing the amount of the tax was not subject to collateral attack, the court below said:

> "Appellant insists that the action of the state board was *quasi* judicial and is not subject to collateral attack. This contention would require consideration, if the charge were a tax. *Holding it to be a liability under a contract,* we find no error in the court's looking to the contract for the measure of the liability."

This position, however, is answered in the case of *In re Danville Rolling Mill Co.,* 121 Fed., 432, *supra,* relied on by appellee. It was there contended that this identical tax imposed a "contractual obligation" upon the corporation. The court (McPherson, J.) said:

> "This argument is ingenious, but I do not regard it as sound. * * * Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' *does not include the public duties that a corporate creature owes to its sovereign creator.* If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt' in the Bankruptcy Act, means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this clause so far as to include the subject now under consideration."

And on reason and principle it is difficult to conceive how the charge can be ranged in the class of contract liabilities.

The Court of Appeals says:

> "If one pays a lump sum or annual sums as

> the consideration for the grant, he does so by virtue of a contract; but he is not thereby relieved from the sovereign demand, *in invitum.*"

The charge in question lacks all the elements of a contract. It applies equally to those corporations which were organized before its passage. The tax is measured by the amount of the issued capital stock, and under the laws of New Jersey, as under the laws of every other state, the capital stock represents property. The Court of Appeals concedes that a state may grant franchises and then tax the granted estate as property. The present tax is clearly a *franchise tax.* Section One of the Act under which it is levied so designates it. Section 2 of the same Act provides that the assessors shall fix the "annual license fee or franchise tax" and that the amount so fixed "shall stand as the *basis of taxation*" under the Act. The tax is similarly designated throughout the remaining sections of the law. In the long line of New Jersey decisions referred to, *supra,* the character of the charge as a tax on corporate franchises is clearly established. Thus, in *Standard Cable Co.* v. *Attorney General,* 46 N. J. Eq., 270, *supra,* the court said:

> "The law in question imposes *a tax* on certain corporations by way of a license for exercising corporate franchises. It is declared to be such *tax* by the act, and, although it is laid on this class of corporations with respect to the capital stock, *the tax possesses the legal quality of a license or franchise tax. Evening Journal Association* v. *State Board of Assessors,* 18 Vr., 36; Cooley Tax (2nd. Ed.), 379, and cases cited.
>
> "Upon the power of the legislature to impose *such a tax,* there exists no restriction in our constitution. As a license or franchise, it is not within the equality clause of the constitution referred to."

A corporation paying an annual license fee for the privilege of exercising its corporate franchise, does not do so by virtue of any *agreement*. The state undoubtedly has the right to increase or decrease the annual franchise tax, or abolish it entirely, as the "sovereign has not bargained with his subject," and the subject can therefore make no complaint. If the obligation to pay were founded in contract, could one party against the consent of the other increase the amount to be paid in its discretion? If the obligation is a contract obligation, why was it necessary to provide as was done by Section 4 of the Act, that an action at law might be maintained to recover the same? The charge possesses none of the elements of a contract, and lacks none of the elements of a tax. It clearly would not be subject to set off or barred by the statute of limitations. The statute creating it designates it as a tax, a long line of decisions thereunder so treats it; it is raised for the purpose of revenue, and the proceeds are payable into the treasury of the state. It is laid, *in invitum* as much so as any other tax. To call it an "arbitrary imposition" makes it none the less a tax. All taxes are more or less arbitrary impositions. To deny that the charge is a tax is to deny to a species the protection which is accorded to its genus.

In an effort to properly classify the charge in question, the Court of Appeals points out that it is not a capitation tax, nor an occupation tax, nor a property tax. If we concede that it is neither the one nor the other of these things, the concession would be wholly immaterial. To obtain priority under section 64a it is not essential that the tax be either a capitation tax,

an occupation tax or a property tax. The Bankruptcy Act is not restricted to any particular species of tax. It applies, *in terms,* to *"all taxes"* without any limitation or qualification whatsoever. The language is clear and explicit and free from any ambiguity.

In the matter of the Mutual Mercantile Agency, 8 Am. Bank. Rep., pp. 435, 437, it is said:

> "There is nothing in the Bankruptcy Act to suggest an intention of Congress in the use of the word 'tax' to limit the meaning to any particular kind of tax."

The misconception underlying the decision of the referee upon this particular question is that section 64A of the Bankruptcy Act is restricted to *strictly property taxes.* The referee said:

> "One of the fundamental principles of taxation is that the property to be taxed should be within the jurisdiction of the state imposing the tax. It is a bare exercise of this franchise exercised solely in the State of Illinois which constitutes the ground of the New Jersey claim, all property of the bankrupt being situate in the State of Illinois; to hold that the State of New Jersey could collect this amount as a priority would be extending to the State of New Jersey privileges which I find no precedent for allowing. It seems to me that the kind of tax contemplated by the Bankruptcy Statute is one *that is a lien on the property out of which the collection is to be made,* and it can hardly be claimed that one state has a lien on property out of its jurisdiction."

This is a misconception of both the purpose and meaning of the Bankruptcy Act. Suppose the bankrupt had had personal property in New Jersey, and that it had been assessed therefor $1,000. Thereafter and before the tax became due the property was de-

stroyed. Referee Eastman holds that "the kind of tax contemplated is one that is a *lien* on the property out of which the obligation is to be made." It is elementary that a tax is *not* a lien on the property. There is no common law rule which makes a tax a lien (27 Am. and Eng. Enc., 2nd Ed., 735, *Heine* v. *Levee Commissioners,* 19 Wall., 655).

Under the referee's ruling, the $1,000 tax could not be proved against the estate of the bankrupt. Such a doctrine does not square with any principle of law known to the books, nor can such an intention be attributed to Congress.

In *Heine* v. *Levee Commissioners,* 19 Wall., 655, it was said:

> "Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized by the legislature to declare them to be liens."

In the note to the above case (Rose's Notes, Vol. 8, p. 283) a long line of cases will be found following the Heine case and holding that a tax is not a lien unless made so by statute. The New Jersey rule is the same.

In *State* v. *Van Horn,* 45 N. J. L., 136, 137, it is said:

> "It is conceded that taxes become liens on property solely from express legislation to that effect. Cooley on Taxation, 305; *Heine* v. *Levee Com'rs,* 19 Wall., 655."

And in *Cadmus* v. *Fagan*, 47 N. J. L., 549, 552, it is said:

> "It is completely settled that taxes, whether general or special imposed by reason of peculiar benefits conferred by a public improvement, become a lien on land only by virtue of express legislation. The power to impose the lien necessarily includes the power to limit its extent and duration. Cooley on Taxation, 305; *Heine* v. *Levee Com'rs*, 19 Wall., 655; *State, Society, &c., pros.*, v. *Paterson*, 13 Vroom, 615; *Johnson* v. *Van Horn*, 16 Vroom, 136."

There is nothing in the bankruptcy law which restricts the meaning of the word "tax" either to property taxes, or to taxes which are a lien on the property out of which the collection is to be made. If Congress intended to restrict priority to any particular species of tax, it would have expressed its intention by words to that effect. It has not done so

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THE AMOUNT OF THE 1902 TAXES.

The claim of appellant for the 1902 taxes was allowed for $4,250. The assessment for that year was $5,750. In that year the corporation neglected to make a return as required by the Act, and the board of assessors, under the provisions of the Act, (sec. 2) fixed the amount at $5,750 on the amount of the *authorized* capital stock ($40,000,000). As a matter of fact but $10,000,000 of the stock was issued and outstanding, and if the corporation had made a return the tax would have been but $4,250.

The Act provides (sec. 2) that on failure of the cor-

poration to make a return as required by section 1 of the Act, the State Board of Assessors shall fix "the annual license fee or franchise tax" and *"the amount so fixed by them shall stand as such basis of taxation under the Act."*

It is clear, as a matter of fact, that the assessors based their assessment on the authorized capital stock instead of upon the issued capital stock. This is chargeable, however, to the failure of the corporation to make a report as required by law. In the absence of such a report, the board of assessors made their assessment according to law. The referee, however, usurped the functions of the board of assessors and figured the assessment on the basis of the issued capital stock.

It is needless to cite from authorities to the effect that in this collateral proceeding the assessment in question cannot be assailed. It is binding on all the world unless impeached in a direct proceeding in the courts of New Jersey. (*Arimex Copper Co.* v. *Board of Assessors*, 69 N. J. L., 121.) The statutes of New Jersey expressly provide a means for the readjustment of excessive or unjust taxes (Laws of New Jersey of 1897, p. 178; also Dill's Corporation Law of N. J., Ed. of 1903, p. 161).

Yet the Court of Appeals affirmed the action of the referee and held that as the liability was one under a contract, there was no error in the court's looking to the contract for the measure of liability. In speaking on this subject, the Court of Appeals said:

> "This contention would require consideration if the charge were a tax. Holding it to be a liability *under a contract*, we find no error in the

courts looking to the contract for the measure of the liability."

The Court of Appeals justified the action of the referee in reducing the 1902 tax by reference to the provisions of Sec. 64a of the Bankruptcy Act. The court said:

> "Moreover the latter part of Sec. 64a seems to direct the bankruptcy courts to determine independently the legality of any such tax."

The latter portion of Sec. 64a is as follows:

> "In case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

This section does not justify the referee in revising a *valid* assessment. That section might apply *if the tax were void;* but as the tax is regular on its face it cannot be assailed collaterally, and it is immaterial that the assessment would have been lower if the corporation had made a return. Even if it were conceded that for this reason the assessment was *erroneous,* this would be far from involving the *"legality"* of the tax.

Again, Section 162 of the Taxing Law provides an adequate remedy if an assessment is either unjust or excessive. The contention that the tax is subject to collateral attack is also conclusively set at rest by the provision of the New Jersey Statute, Sec. 1, Subd. 547 (title "Taxes") Vol. 3 Gen. Stat. of New Jersey, which is as follows:

> "That no tax, assessment or water rate, imposed or levied in this state, shall be set aside or reversed in any court of law or equity in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying, or

levying any such tax, assessment or rate, or in the proceeding for collecting the same, if the person against whom, or the property upon which such tax, assessment or rate is assessed or laid is, in fact, liable to taxation, or assessment or imposition of such water rate, in respect of the purposes for which such tax, assessment or rate is levied, assessed or laid; and the court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate is required to amend all irregularities, or errors, or defects, and is empowered, if need be, to ascertain and determine for what sum such person or property was legally liable to taxation, or assessment, or water rate, and by order or decree to fix the amount thereof; and the sum so fixed shall be the amount of tax, assessment or water rate for which such person or property shall be liable, and the same shall be and remain a first lien or charge upon the property and persons, and collectible in the manner provided by law, the same as if such tax, assessment or water rate had been legally levied, assessed or imposed in the first instance by the city, town, township, commission, board or other authority attempting to make, impose or levy the same; it shall be the duty of the court to make a proper levy, imposition or assessment in all cases in which there may lawfully be an assessment, imposition, or levy; and such court is hereby given full and ample authority to make a lawful levy, assessment or imposition."

And in *State* v. *Dodge*, 47 N. J. L. 436, s. c. 2 Atl. 810, it was held that the curative force of the above act embraces all the steps necessarily taken in levying the public revenues.

And see also numerous authorities cited in the annotations to the above section to the effect that the act must be liberally construed.

THE 1903 TAXES.

Cross-error has been assigned with respect to the action of the Court of Appeals in allowing appellant's claim of $2,500 for the 1903 taxes.

The referee disallowed the claim on the ground that it was not a fixed liability at the time of the filing of the petition in bankruptcy. The petition was filed April 23, 1903. Under the law, the tax in question is assessed upon the capital stock of the corporation, issued and outstanding on January 1st preceding (Laws of N. J., 1901, p. 31; Dill's Corporation Laws of N. J., Ed. of 1903, p. 152).

It is there provided that "All corporations * * * shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation *issued and outstanding on the first day of January preceding the making of said return* * * *"

The tax is payable in advance for the ensuing year. And so it was held in *Hardin* v. *Morgan*, 70 N. J. L., 484, s. c., 57 Atl., 155; see, also, *Brewing Improvement Co.* v. *Assessors*, 65 N. J. L., 466; s. c., 47 Atl., 426.

In 1903 the corporation made a return (Rec., 27), stating the amount of its capital stock issued and outstanding on January 1st of that year. It is upon this return that the assessment was made. Even though this assessment was not made until after the filing of the petition in bankruptcy, it is a provable claim because the making of the assessment was a mere ministerial duty on the part of the board to

figure out the amount of the statutory tax due, viz., one-tenth of one per cent.

Again, Section 63a of the Bankruptcy Act provides that certain debts may be proved against the bankrupt estate. Under this section it is immaterial when a debt is *payable*. It is sufficient if the *liability to pay* is *fixed* at the time the petition is filed. The amount of the present tax is regulated by the statute and the proceedings of the assessors thereafter cannot change the basis of the tax. *Certum est quod certum reddi potest.*

It will also be noticed that "taxes" are not specified in the list of provable debts referred to in section 63. Taxes are covered by section 64. Under that section taxes are a charge against the estate, and are, in effect, an expense of administration. This is evidenced by the language to the effect that the court *shall order the trustee to pay all* taxes legally due and owing by the bankrupt.

Section 63 contains an express limitation that the debts shall be owing "at the time of the filing of the petition." Section 64 contains no such limitation and it is immaterial whether the taxes are, or are not owing at the time of the filing of the petition. It is well settled that a discharge in bankruptcy does not discharge a liability to the state for taxes. In Collier on Bankruptcy (5th Ed.), p. 208, under the head of "What Debts Are Not Dischargeable," it is said:

> "*Liabilities to the State.*—This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself. Indeed, it is thought that taxes would be excepted

from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in Sec. 64a, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. *Besides, the words used in Sec. 64a seem to take taxes out of the class known as 'provable debts,' and thus they could not be discharged in any event.*"

In the U. S. Car Co. case, 60 N. J. Eq., 514, s. c., 43 Atl., 673, the exact contention was passed upon. The court said:

> "But it is contended on behalf of the receivers that even if it be considered that this 'tax' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state *when determined,*' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for *then existing creditors.*
>
> * * * * *
>
> "It is manifest, therefore, that when the 'tax,' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in its hands, for there is no other fund upon which it can be charged, and consequently in no other way can each of these two statutory provisions be given full force and effect."

And on page 516 the court said that the tax was due—

> "Without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its lia-

bility to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*"

It thus appears that the taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed. A discharge in bankruptcy would not bar the claim of the state against the corporation, as under the decision in the Car Company case the corporation is liable until its charter is surrendered to the state. Suppose the tax in question had been assessed against the tangible property while in the possession of the trustee; surely the trustee would be liable therefor. Wherein lies the difference between a corporate or franchise tax and the one supposed?

The Court of Appeals, in allowing the claim for the 1903 taxes, said:

"As to the $2,500 item, the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the 1st of July in each year a sum based on the amount of stock issued and outstanding on the 1st day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903, the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding when the 1st of January should come around. But on that date we think the promise accrued to pay one-tenth of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the 1st

of July affects only the maturity of the obligation."

(See 137 Fed., 858, 863.)

We submit that the claim of the state for the 1903 taxes should also be allowed.

While we recognize the intent of the Bankruptcy Act to create equality among creditors, and to provide for an equitable distribution of the bankrupt's estate, that principle is no more important, if indeed as important, as that which prompted Congress to require the payment of taxes as preferred claims. It has been truly said that taxes

> "are the wheels of government; and when taken away or clogged, government ceases to move; or rolls with a rickety and uncertain motion."
>
> *Mayor* v. *Feeley,* 66 Ga., 31.

Substantially the sole source of appellant's revenue is derived from the imposition of franchise taxes of the class under consideration. The State of New Jersey regarded them as so essential to a proper discharge of her sovereign duties that her legislature expressly provided that these taxes "be a *preferred* debt in case of insolvency"; and we believe it is clear that Congress had no intention to legislate to any different effect.

We submit that appellant's entire claim should be allowed as a preferred claim.

Respectfully submitted,

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